TEGAS SEPAKAT SDN. BHD.

v.

MOHD. FAIZAL TAN ABDULLAH

HIGH COURT MALAYA, JOHOR BAHRU
LC VOHRAH J
[ORIGINATING SUMMONS NO. 269 OF 1992]
25 JUNE 1992

CONSTITUTIONAL LAW: *Wakaf disposition of land in 1982 - Disputed - Federal Court in 1982 upheld the wakaf as valid - Lujnah Fatwa issued a fatwa that the land was not a wakaf land and therefore the disposition was invalid - The fatwa was adopted as a decree by Syariah Court of Johor Bahru on 14 December 1991 - Respondent claimed Federal Court decision was reversed by the Syariah Court's decree as the Constitution (Amendment Act) 1988 ousted Civil Court's jurisdiction in respect of wakaf matters - Whether doctrine of stare decisis, issue estoppel and res judicata applied - Administration of Islamic Law Enactment 1978 (Johore), ss. 15, 16.*

In 29 March 1992, the plaintiffs bought Lot 883 (the said land) from its registered trustees. The said land had been devised under a deed of wakaf in 1909 by the late Mohamed Salleh b. Perang in favour of his two (2) out of his ten (10) children, namely Othman b. Mohd Salleh and Kalthom b. Mohd Salleh and their children.

In 1982, the Federal Court had held that the above wakaf made in favour of the two children and their issues forever was valid. This decision effectively excluded the other eight (8) children and their descendants from any beneficial interest in the land, including one Suleiman Mohd. Salleh, who was a son of one of the eight children not included in the wakaf.

The respondent, who was the attorney of the "sole surving beneficiary" and daughter of Suleiman, lodged a caveat under s. 323(1) of the National Land Code alleging that the donors of his power of attorney claimed the title or any other registrable interest in the said land.

He relied on a fatwa issued by the Lujnah Fatwa which was published in the Johore State *Gazette* No. 1598 of 1991 on 5 December 1991 and adopted as a decree by the Syariah Court on 14 December 1991 which declared (1) that the said land was not a wakaf land; (2) that the said land was the property of Suleiman and his heirs according to Hukum Faraid; (3) that the previous fatwa of the Mufti of Johor issued on 22 March 1970 relating to the wakaf made in favour of Othman and Kalthom and their descendants was invalid.

He claimed that the decree dated 14 December 1991 reversed the Federal Courts decision on the matter and the fatwa of the previous mufti as the amendment to Article 121 of the Federal Constitution, which came into force on 10 June 1988 ousted the jurisdiction of the Civil Courts in respect of wakaf matters. As such the High Court was bound by the decree of the Syariah Court.

Held:

[1] The judgment of the Federal Court must remain binding so long as it stands. The doctrines of *stare decisis, res judicata* and *issue estoppel* continue to apply as the Constitution (Amendment) Act 1988 which brought about the amendment to Article 121 did not have any retrospective effect.

[2] Therefore a person who was neither a descendant of Othman bin Mohd. Salleh nor Kalthom bin Mohd. Salleh had no caveatable interest in the said land in the light of the Federal Court decision.

[3] There is no question here either of a Civil Court surrendering to the jurisdiction of the Lujnah Fatwa. That body is merely a syariah committee as defined under s. 15 of the Johore Administration of Islamic Law Enactment 1978 and thus cannot come under the term "a Court of law". A civil Court thereby need not consider any submission of jurisdiction to this body.

[Application allowed.]

Case referred to:

Re Dato Bentara Luar, Decd. Haji Yahya bin Yusoff & Anor. v. Hassan bin Othman & Anor. [1982] 2 MLJ 265 FC ***(foll)***

Legislation referred to:

Federal Constitution, art. 121(1A), Ninth Schedule List II para. 1
Administration of Islamic Law Enactment 1978 (Johore), ss. 15, 16
National Land Code 1965, s. 323(1)(a)

JUDGMENT

LC Vohrah J:

The plaintiff became the registered owner of the piece of land known as Lot 883 in the Township of Johor Bahru on 29 March 1992 after having purchased it from its registered trustees. It was land which was devised under a deed of wakaf in 1909 by the late Mohamed Salleh bin Perang, also known as Dato Bentara Luar of Johor, in favour of two of his 10 children, namely Othman bin Mohd. Salleh and Kalthom bin Mohd. Salleh and their children. This wakaf disposition was disputed and the facts relating thereto have been fully dealt with in two judgments, one of the High Court and the other of the Federal Court, and do not require repetition. In the very comprehensive judgment of the Federal Court, *Re Dato Bentara Luar, Decd. Haji Yahya bin Yusoff & Anor. v. Hassan bin Othman & Anor.* [1982] 2 MLJ 265 re-affirming the decision of the High Court, the Federal Court held, *inter alia*, that the wakaf made in 1909 by the late Dato Bentara Luar of Johor, in favour of Othman and Kalthom and their issues forever was valid. It is to be noted that Suleiman bin Mohd. Salleh was a son of one of the 8 children who were not included in the wakaf.

The effect of these two judgments is therefore that the descendants of the late Dato Bentara Luar including those of Suleiman bin Mohd. Salleh other than those claiming lineal descent from Othman and Kalthom have no beneficial interest in the said land.

The respondent now comes into the picture as the attorney of the "sole surviving beneficiary and daughter" of Suleiman and also of the "family heads of the beneficiaries of the six (6) deceased children" of Suleiman and he has lodged the caveat in respect of the said land under the provisions of s. 323(1)(a) of the National Land Code on the ground that the donors of his power of attorney are claiming title to, or registrable interest or any right to such title or interest in the said land by virtue of their descent from Suleiman.

Mr. Chua for the applicant has demonstrated quite persuasively that in the light of the two judgments referred to above the doctrines of *stare decisis*, *issue estoppel* and *res judicata* would apply to disqualify any of the descendants of Suleiman and, accordingly, the respondent on behalf of any of them, from lodging a caveat in respect of the said land. Mr. Ball for the respondent has not attempted in any way to challenge the application of these three doctrines as expounded by Mr. Chua but submits that a recent fatwa issued by the Lujnah Fatwa which was published in the Warta Kerajaan Negeri Johor No. 1598 of 1991 on 5 December 1991 and adopted in the form of a decree by the Syariah Court of Johor Bahru

on 14 December 1991 declaring that the said land is not wakaf land, that the said land is the property of Suleiman and his heirs according to Hukum Faraid, that the previous fatwa of the Mufti of Johor issued on 22 March 1970 relating to the wakaf made in favour of Othman and his descendants is invalid, and that the order of the Kadi of Johor Bahru made on 14 July 1974 relating to the wakaf khas made in favour of Kalthom and her descendants was not valid, "reverses the decisions of the High Court and the Federal Court and the fatwa of the previous Mufti" on which these two Civil Court judgments were based. Mr. Ball argues that this is because the amendment to Article 121 of the Federal Constitution which came into force on 10 June 1988 in the form of Clause (IA) ousted the jurisdiction of the Civil Courts in respect of wakaf khas and intestate matters as set out in para. 1 of List II of the Ninth Schedule to the Federal Constitution and that the High Court is now bound by the order of the Syariah Court adopting the recent fatwa with its declarations.

I do not agree. As a Judge of the High Court I certainly cannot take issue with the judgment of the Federal Court, now re-designated the Supreme Court, as long as that judgment stands. Further, there is nothing in the Constitution (Amendment) Act 1988 which brought about the amendment pertaining to the jurisdiction of the Civil Courts in respect of any matter within the jurisdiction of the Syariah Courts which gives Article 121(1A) restrospective effect and, accordingly, the three doctrines of *stare decisis*, *issue estoppel* and *res judicata*, not having been challenged in my view, continue to apply so that no descendant who is not a descendant of Othman or Kalthom can be recognised in this Court as a person capable of having a caveatable interest in the said land under the provision of s. 323(1) of the National Land Code so long as the Federal Court decision on this point stands.

A further point has been taken by Mr. Ball which amounts to the suggestion albeit faint that there is here perhaps a case of surrendering to the jurisdiction of the Lujnah Fatwa by virtue of the letter Exhibit 'c' of Encl. (9) dated 2 June 1992 written by solicitors for the registered trustees of the said land. Although the Lujnah Fatwa is an august body constituted under s. 15 of the Johore Administration of Islamic Law Enactment 1978 it is defined as a "syariah committee" and is charged under s. 16 with the function of issuing on request rulings on any question relating to Syariah Law. As a committee it cannot therefore be construed as a Court of law for the purposes of submission to jurisdiction. In any event I agree with the contention made on behalf of the plaintiff that the writing of the letter was in effect an attempt to set out the history relating to the litigation in the matter and to explain the full import of the judgments of the Civil Courts and cannot be interpreted as an act of submission to the jurisdiction of the Syariah Court for further adjudication in a matter which had been finally determined by the Federal Court well before the constitutional amendment. In the result, I make an order in terms of prayers 1, 2, 3 and 4 of this application.

Also found at [1992] 4 CLJ 2297